STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE JOHNSON, JR.,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 196079
Macomb Circuit Court
LC No. 95-002968

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession with intent to deliver less than 50 grams of cocaine-second offense, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv); MCL 333.7413(2); MSA 14.15(7413)(2). Defendant was sentenced to consecutive terms of three to eight years and three to forty years' imprisonment. We affirm.

First, defendant contends that the evidence was insufficient to show that he knowingly possessed the cocaine with the intent to deliver. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992)..

At trial, the prosecution presented both direct evidence and circumstantial evidence to establish defendant's possession of the cocaine. Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence just as it can be established by direct evidence. *Id.* at 525. An FBI agent testified that he saw defendant reach inside his sock and pull out a small baggie of what later was learned to be crack cocaine. The agent further testified that he then saw defendant pull the baggie up along his leg. Moreover, the FBI agent and two police officers testified that they saw the baggie of crack cocaine beneath defendant's legs, near his crotch area.

Even if the jury did not believe the FBI agent, testimony was submitted at trial that defendant was almost lying on top of the cocaine, that he was the closest person to the $1,600 worth of cocaine and that he was the only person in the area where the cocaine was located. We find the evidence was sufficient to allow a rational trier of fact to conclude that defendant had control of the cocaine and knew that it was present. *Id.* at 520.

In addition to possession, the prosecution had to prove that defendant had the intent to deliver the cocaine. Actual delivery of the cocaine is not required to prove intent to deliver. Intent to deliver can be inferred from: (1) the quantity of narcotics in the defendant's possession, (2) the way in which those narcotics are packaged, and (3) from the circumstances surrounding the arrest. *Id.* at 524. At trial, the evidence offered that the quantity of cocaine, forty rocks, was greater than one person would carry for personal use. In addition, the lessee of the apartment where defendant was arrested admitted that drug dealers used his apartment to sell drugs. Accordingly, we find that the evidence was sufficient to support defendant's conviction of possession with intent to deliver less than 50 grams of cocaine.

Defendant also argues that his sentence for delivery of cocaine is disproportionate. We disagree. A sentence must be proportionate to the seriousness of the crime and defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The sentencing guidelines do not apply where, as here, the sentence was enhanced under the subsequent drug-offender provision. *People v White*, 208 Mich App 126, 135; 527 NW2d 34 (1994). Thus, when reviewing the sentences of habitual offenders, this Court should determine whether the trial court abused its discretion in imposing the sentence. See *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996).

The statutory term of imprisonment for possession with intent to deliver less than 50 grams of cocaine is found under MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), which prescribes imprisonment "for not less than 1 year nor more than 20 years." However, because of defendant's prior felony convictions involving controlled substances, the trial court sentenced defendant under MCL 333.7413(2); MSA 14.15(7413)(2), which prescribes that an individual convicted of two or more subsequent offenses may be imprisoned for a term twice the term otherwise allowed. Here, in light of defendant's criminal past, his criminal activity while on parole, and his history of substance abuse, we find the trial court did not abuse its discretion in sentencing defendant to a term of three to forty years' imprisonment and find that defendant's sentence was proportionate to this offense and this offender.

In addition, defendant argues that the trial court's denial of his request for credit for the time spent in jail from the date of his arrest until his sentencing, violated the State and Federal Constitution as well as Michigan statutory law. There is no merit to this issue. A parolee is not entitled to credit toward the second sentence for time served while being held on a parole detainer. *People v Stewart*, 203 Mich App 432; 513 NW2d 147 (1994). Nor does MCL 791.238; MSA 28.2308, inflict cruel or unusual punishment under US Const, Am VIII or cruel or unusual punishment under Const 1963, art 1, § 16 or violate defendant's rights to equal protection and due process under US Const, Am XIV, § 1

and Const 1963, art 1, §§ 2, 17. *Id.* at 148. Accordingly, the trial court did not err as a matter of law in refusing to give defendant credit for time served.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.